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Bruce Ryder

Osgoode Hall Law School of York University, bryder@osgoode.yorku.ca

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The Strange Double Life of Canadian Equality Rights

Bruce Ryder*

I. DOCTRINAL DIVERGENCE: THE *LAW* AND *MEIORIN* RULINGS OF 1999

In 1999, the Supreme Court of Canada issued two important rulings on equality rights that ambitiously sought to reshape the law in their respective realms. One, *Law v. Canada*,¹ concerned constitutional equality rights. The other, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* (“*Meiorin*”),² involved statutory equality rights. The contrast between how the Court approached the task of defining equality rights in these two realms was stark.

In *Law*, the Court dismissed a challenge brought by Nancy Law, based on section 15(1) of the *Canadian Charter of Rights and Freedoms*,³ to provisions of the *Canada Pension Plan* that denied her a survivor pension because she was under the age of 35 at the time of her spouse’s death. Ms. Law could have sought redress through the *Canadian Human Rights Act*, which, like the anti-discrimination statutes in every Canadian jurisdiction, prohibits age discrimination in the provision of services, a prohibition that applies to both private and public actors.⁴ She chose instead to pursue her claim in court based on the Charter.

* Osgoode Hall Law School, York University.

¹ *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.) [hereinafter “*Law*”].

² *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union (BCGSEU)* (“*Meiorin Grievance*”), [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3 (S.C.C.) [hereinafter “*Meiorin*”].

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “*Charter*”].

⁴ See s. 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6; *Canada Pension Plan*, R.S.C. 1985, c. C-8.

The provisions challenged in *Law* imposed differential treatment on the basis of age, a ground of discrimination listed in section 15. Justice Iacobucci, writing for a unanimous Court, took the opportunity to develop an elaborate theory for determining when disadvantageous distinctions drawn on prohibited grounds are discriminatory and thus infringe section 15(1). On the test he put forward, Nancy Law had to establish that a reasonable person in her position would find that the legislative imposition of differential treatment had the effect of demeaning her human dignity.⁵ The inquiry into human dignity in turn required a consideration of four contextual factors.⁶ Justice Iacobucci's 10-point summary of the general approach consumed five pages in the Supreme Court Reports.⁷ He concluded that the challenged provisions took into account a correspondence between the age of a surviving spouse and the existence of long-term financial need.⁸ For this reason, the provisions did not demean the dignity of relatively young surviving spouses, and therefore did not amount to discrimination. Since the claimant had not established an infringement of section 15(1), the government was not called upon to justify the challenged legislation pursuant to section 1 of the Charter.

Six months later, the Court issued its ruling in *Meiorin*. The case involved a challenge by Tawney Meiorin, a forest firefighter, to her dismissal after she failed to pass a mandatory aerobic test introduced by the government. Ms. Meiorin argued that the aerobic standard discriminated on the basis of sex as women had more difficulty meeting it than men. Because she was employed by the government and was challenging a government policy, Ms. Meiorin could have based her challenge on section 15(1) of the Charter, and sought a remedy in court. She chose instead to pursue her claim before the British Columbia Human Rights Tribunal, relying on the statutory prohibition on sex discrimination in employment set out in the B.C. *Human Rights Code*.⁹

Writing for a unanimous Court in *Meiorin*, McLachlin J. (as she then was) had no difficulty concluding that the aerobic test was

⁵ *Supra*, note 1, at para. 75.

⁶ The four contextual factors are: (1) pre-existing disadvantage; (2) the correspondence between the ground of discrimination at issue and the relevant characteristics or circumstances of the claimant; (3) the ameliorative purpose or effects of the challenged law or policy; and (4) the importance of the interest at stake. *Id.*, at paras. 62-75.

⁷ *Id.*, at para. 88.

⁸ *Id.*, at paras. 104-108.

⁹ Section 13(1) of the *Human Rights Code*, R.S.B.C. 1996, c. 210.

discriminatory. She applied the test for establishing a *prima facie* case of discrimination set out in *O'Malley v. Simpsons-Sears*: did the challenged rule impose adverse differential treatment at least in part on the basis of a prohibited ground?¹⁰ To meet the *O'Malley* test, the claimant's burden of proof consists of proving the following three elements on the balance of probabilities: (1) he or she is a member of a group identified by one or more prohibited grounds of discrimination; (2) he or she was subjected to adverse differential treatment; and (3) a prohibited ground was a factor in the adverse differential treatment.¹¹ It followed that if Tawney Meiorin could establish that her inability to pass the aerobics test was at least in part related to her sex, then she would discharge her burden of establishing a *prima facie* case of discrimination and the burden of establishing a defence or justification would then shift to the respondent.

Applying this test, it took McLachlin J. just a few swift sentences to conclude that Ms. Meiorin had established that the aerobic standard had a differential adverse impact on women.¹² The labour arbitrator had found that "most women are adversely affected by the high aerobic standard". Therefore, McLachlin J. wrote, Ms. Meiorin "demonstrated that the aerobic standard is *prima facie* discriminatory".¹³ The burden then shifted to the government to justify the standard. Justice McLachlin found that the government had not demonstrated that the rule was reasonably necessary to ensuring that forest firefighters are able to work safely and efficiently.¹⁴ The Court ordered that Ms. Meiorin be reinstated, with compensation for lost wages and benefits, because her dismissal was based on a discriminatory standard.¹⁵

¹⁰ *Ontario (Human Rights Commission) v. Simpsons-Sears*, [1985] S.C.J. No. 74, [1985] 2 S.C.R. 536, at 551-52 (S.C.C.) [hereinafter "*O'Malley*"]. See also *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] S.C.J. No. 73, [1999] 3 S.C.R. 868 (S.C.C.) [hereinafter "*Grismer*"].

¹¹ The *O'Malley* test is frequently stated in these terms. For a recent example, see *Shaw v. Phipps*, [2012] O.J. No. 2601, 289 O.A.C. 163, at para. 14 (Ont. C.A.). See also the discussion in *Peel Law Assn. v. Pieters*, [2013] O.J. No. 2695, 116 O.R. (3d) 81, at paras. 53-62 (Ont. C.A.), affirming the application of the test as stated in *Shaw v. Phipps*.

¹² In *Grismer*, *supra*, note 10, a case decided a few months after *Meiorin*, one sentence was all it took for the Court to conclude that the visually impaired claimant had established a *prima facie* case of discrimination: "Mr. Grismer established a *prima facie* case of discrimination under the Act by showing that he was denied a [driver's] licence that was available to others, and that the denial was made on the basis of a physical disability." *Id.*, at para. 23.

¹³ *Meiorin*, *supra*, note 2, at para. 69.

¹⁴ *Id.*, at para. 83.

¹⁵ *Id.*, at para. 84.

Law and *Meiorin* were unanimous rulings of the Court. Both disposed of challenges to government rules that imposed adverse differential treatment based on prohibited grounds of discrimination. In *Law*, the Court's entire discussion is devoted to concluding that the adverse differential treatment on a prohibited ground did not amount to discrimination. In *Meiorin*, the Court quickly found that the adverse differential treatment on a prohibited ground amounted to *prima facie* discrimination. Its discussion was focused on whether the government could justify the rule. The *Law* opinion is consumed by the problem of defining discrimination; the *Meiorin* opinion had no difficulty finding *prima facie* discrimination, and focused instead on clarifying the test for justification.¹⁶ In *Meiorin*, the Court held the government to account, calling on it to explain the necessity of a discriminatory rule. In *Law*, the Court did not require the government to justify the challenged rule pursuant to section 1 of the Charter.

In *Meiorin*, McLachlin J. did not mention the elaborate human dignity test the Court had put forward for determining discrimination in the Charter context in the *Law* ruling earlier in the same year. In *Law*, Iacobucci J. did not mention the less burdensome *O'Malley* test for establishing *prima facie* discrimination that operates in the statutory context. The two rulings simply did not speak to each other.

In many ways the tests for discrimination expounded in the statutory and constitutional contexts coincide: ever since *Andrews*,¹⁷ the Court's first ruling interpreting section 15 of the Charter, the Court has emphasized that section 15 and Human Rights Codes have the common purpose of overcoming substantive discrimination. In defining discrimination under the Charter, the Court has been inspired and guided from the outset by jurisprudence developed by Canadian human rights tribunals and courts when interpreting statutory prohibitions on discrimination in Human Rights Codes. In McIntyre J.'s discussion of the meaning of discrimination in *Andrews*, he began with a brief overview of the history of Canadian Human Rights Codes,¹⁸ stated that "there is little difficulty ... in isolating an acceptable definition" from the case law

¹⁶ Once a claimant has established *prima facie* discrimination, the Court held that an employer may justify an impugned rule by establishing that it is rationally connected to job performance, has been adopted in an honest and good faith belief, and is reasonably necessary in the sense that it is impossible to accommodate employees without undue hardship. *Id.*, at para. 54.

¹⁷ *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.) [hereinafter "*Andrews*"].

¹⁸ *Id.*, at 172.

interpreting the Codes,¹⁹ and cited the *O'Malley* ruling for its definition of discrimination as adverse differential treatment on the basis of a prohibited ground.²⁰ He also adopted the definitions of adverse-effects discrimination and systemic discrimination from *O'Malley* and *Action Travail des Femmes*,²¹ respectively,²² establishing that a substantive conception of discrimination, focused on effects that exacerbate the subordination of historically disadvantaged groups, would henceforth guide Canadian anti-discrimination law in both the statutory and constitutional realms. Furthermore, he took the position that, in general, “the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1)”.²³ In particular, he noted, “discrimination under s. 15(1) will be of the same nature and in descriptive terms will fit the concept of discrimination developed under the Human Rights Acts”.²⁴

Despite the emphasis on a harmonized approach to the definition of discrimination in *Andrews*, some passages in McIntyre J.’s opinion hinted that section 15 claimants might have to establish something more than adverse differential treatment on the basis of a prohibited ground of discrimination. That added requirement turned out to be a violation of human dignity according to the *Law* ruling, and, later, according to *Kapp*²⁵ and *Withler*,²⁶ the operation of prejudice or stereotype. The added requirement might seem to be a minor wrinkle on otherwise identical statutory and constitutional tests. Perhaps that is true on the page. But, in practice, judges have interpreted this added element in a manner that has turned it into a formidable barrier for claimants. The human dignity requirement, or more recently, the requirement of proving the operation of prejudice or stereotype, has been the fulcrum on which many section 15 claims have turned.

Justice Iacobucci intimated in *Law* that it would be “rare” for a court not to find discrimination if a claimant establishes adverse differential

¹⁹ *Id.*, at 173.

²⁰ *Id.*

²¹ *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] S.C.J. No. 42, [1987] 1 S.C.R. 1114 (S.C.C.) [hereinafter “*Action Travail des Femmes*”].

²² *Andrews*, *supra*, note 17, at 173-74.

²³ *Id.*, at 175.

²⁴ *Id.*, at 176.

²⁵ *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.) [hereinafter “*Kapp*”].

²⁶ *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12, [2011] 1 S.C.R. 396 (S.C.C.) [hereinafter “*Withler*”].

treatment on a prohibited ground.²⁷ How wrong this prediction has proven to be. Half of the Supreme Court of Canada's post-*Law* section 15 decisions are precisely the kind that Iacobucci J. supposed would be "rare" — that is, cases where the Court found that adverse differential treatment on prohibited grounds did not amount to discrimination because the claimant failed to demonstrate a violation of human dignity or the operation of prejudice or stereotype.²⁸ If these claims had been adjudicated according to the *O'Malley/Meiorin* allocation of burdens of proof, the claimants would have succeeded in demonstrating a *prima facie* case of discrimination, and the burden of justification would have then fallen on the government respondents. In Charter litigation, governments are frequently absolved by courts adjudicating section 15 claims of any duty to explain the need for laws or policies that impose adverse differential treatment on the members of historically

²⁷ *Law*, *supra*, note 1, at para. 110.

²⁸ Examples from the Supreme Court's post-*Law* jurisprudence include, in reverse chronological order: *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] S.C.J. No. 37, [2011] 2 S.C.R. 670 (S.C.C.) [hereinafter "*Cunningham*"] (adverse differential treatment of status Indians not discriminatory); *Fraser v. Ontario (Attorney General)*, [2011] S.C.J. No. 20, [2011] 2 S.C.R. 3 (S.C.C.) [hereinafter "*Fraser*"] (adverse differential treatment of agricultural workers not discriminatory); *Withler*, *supra*, note 26 (adverse differential treatment on the basis of age not discriminatory); *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567 (S.C.C.) [hereinafter "*Hutterian Brethren*"] (adverse differential treatment on the basis of religion not discriminatory); *C. (A.) v. Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No. 30, 309 D.L.R. (4th) 581 (S.C.C.) [hereinafter "*C. (A.)*"] (adverse differential treatment on the basis of age not discriminatory); *Ermineskin Indian Band and Nation v. Canada*, [2009] S.C.J. No. 9, [2009] 1 S.C.R. 222 (S.C.C.) [hereinafter "*Ermineskin*"] (adverse differential treatment of Indian bands not discriminatory); *Kapp*, *supra*, note 25 (adverse differential treatment on the basis of race not discriminatory); *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.) [hereinafter "*Health Services*"] (adverse differential treatment on the basis of sex not discriminatory); *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357 (S.C.C.) (adverse differential treatment on the basis of marital status not discriminatory); *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.) (adverse differential treatment on the basis of age not discriminatory); *Nova Scotia (Attorney General) v. Walsh*, [2002] S.C.J. No. 84, [2002] 4 S.C.R. 325 (S.C.C.) (adverse differential treatment on the basis of marital status not discriminatory); *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.) (adverse differential treatment on the basis of age not discriminatory); *Lovelace v. Ontario*, [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950 (S.C.C.) (adverse differential treatment on the basis of Aboriginal band status not discriminatory); *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] S.C.J. No. 29, [2000] 1 S.C.R. 703 (S.C.C.) (adverse differential treatment on the basis of physical disability not discriminatory); *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] S.C.J. No. 31, [1999] 2 S.C.R. 625 (S.C.C.) (adverse differential treatment on the basis of mental disability not discriminatory).

disadvantaged groups, or of explaining whether they considered alternative, less burdensome means of accomplishing their objectives.

Ever since the strange double life of Canadian equality rights came to the fore in the Court's 1999 rulings, debate has raged in the case law and legal scholarship about whether the constitutional definition of discrimination should infiltrate the statutory realm.²⁹ Yet the Supreme Court of Canada has remained curiously silent on the issue. The Court continues to cite the *O'Malley* test in the statutory realm³⁰ and the Court has applied a more burdensome test in the constitutional realm.

To better align its jurisprudence with section 15's objective of promoting substantive equality, in *Kapp*³¹ and *Withler*³² the Court reduced the burdens on equality rights claimants by eliminating the need to prove a violation of human dignity, and by eliminating the need to rely on proof of discriminatory treatment compared to a single, correct "mirror comparator group". The Court restated the test for establishing a violation of section 15(1) in simpler terms than the prolix *Law* test: "(1) Does the law

²⁹ The leading case in Ontario was, until the past year, *Ontario (Director, Disability Support Program) v. Tranchemontagne*, [2010] O.J. No. 3812, 102 O.R. (3d) 97 (Ont. C.A.) [hereinafter "*Tranchemontagne*"]. For reasons discussed below, Simmons J.'s Charter-inflected revision of the test for establishing discrimination in the statutory realm is no longer reliable after the Supreme Court's rulings in *Moore*, *infra*, note 35, and *Quebec v. A.*, *infra*, note 34. For excellent discussions of the issues and case law, see A. Wayne MacKay, "The Marriage of Human Rights Codes and Section 15 of the *Charter* in Pursuit of Equality: A Case for Greater Separation in Both Theory and Practice" (2013) U.N.B.L.J. (forthcoming) [hereinafter "*MacKay*"]; Denise Réaume, "Defending the Human Rights Codes from the *Charter*" (2012) 9 J.L.E. 67 [hereinafter "*Réaume*"]; Benjamin Oliphant, "*Prima Facie* Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence?" (2012) 9 J.L.E. 33 [hereinafter "*Oliphant*"]; Lesli Bisgould, "Twists and Turns and Seventeen Volumes of Evidence, or How Procedural Developments Might Have Influenced Substantive Human Rights Law" (2012) 9 J.L.E. 5 [hereinafter "*Bisgould*"]; Leslie A. Reaume, "Postcards from *O'Malley*: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the *Charter*" [hereinafter "*Reaume*"] in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006), at 373-408 [hereinafter "*Faraday, Denike & Stephenson*"]; Andrea Wright, "Formulaic Comparisons: Stopping the *Charter* at the Statutory Human Rights Gate" [hereinafter "*Wright*"] in Faraday, Denike & Stephenson, *id.*, at 409-41; Karen Schucher & Judith Keene, *Statutory Human Rights and Substantive Equality – Why and How to Avoid the Injury of the Law Approach* (Toronto: LEAF, 2007) [hereinafter "*Schucher & Keene*"]; Karen Schucher, "Human Rights Statutes as a Tool to Eliminate and Prevent Discrimination: Reflections on the Supreme Court of Canada's Jurisprudence" in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010), at 387-422.

³⁰ See, e.g., *New Brunswick (Human Rights Commission) v. Potash Corp. of Saskatchewan Inc.*, [2008] S.C.J. No. 46, [2008] 2 S.C.R. 604, at para. 49 (S.C.C.).

³¹ *Kapp*, *supra*, note 25.

³² *Withler*, *supra* note 26.

create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?”³³

Despite these changes, the contrast between the Court’s consistent, confident, clear and succinct approach to the claimant’s burden in the realm of statutory equality rights, and its fluctuating, verbose, demanding and anxious approach to the claimant’s burden in the context of section 15(1) of the Charter, remains striking, and strikingly evident in its two most recent decisions dealing with equality rights. Just as *Law* and *Meiorin* revealed the strange double life of equality rights in 1999, *Quebec (Attorney General) v. A.*³⁴ and *Moore v. British Columbia (Education)*³⁵ are this past year’s Jekyll and Hyde. The four opinions in *Quebec v. A.* are cumulatively as verbose and complex as Iacobucci J.’s opinion was in *Law*, while Abella J.’s opinion in *Moore* is as incisive and clear as McLachlin J.’s opinion was in *Meiorin*.

Before turning to a discussion of *Moore* and *Quebec v. A.*, we will explore several other features of the terrain on which these two rulings landed. The discussion above outlined the doctrinal divergence in the definitions of discrimination operating in the constitutional and statutory realms. But we should be careful not to get caught up exclusively in parsing the words used in the different legal tests. The pattern of results reached by courts and human rights tribunals may be more important than the words they use to explain those results. The next section will take a quick glance at data on courts and human rights tribunals’ disposition of equality rights cases in the constitutional and statutory realms.³⁶

II. DIVERGENCE IN CONSTITUTIONAL AND STATUTORY EQUALITY RIGHTS PRACTICE

One useful measure of the equality rights practice of courts and human rights tribunals is the rate at which claimants succeed in establishing

³³ *Kapp*, *supra*, note 25, at para. 17; *Withler*, *supra*, note 26, at para. 30.

³⁴ [2013] S.C.J. No. 5, 354 D.L.R. (4th) 191 (S.C.C.) [hereinafter “*Quebec v. A.*”].

³⁵ [2012] S.C.J. No. 61, [2012] 3 S.C.R. 360 (S.C.C.) [hereinafter “*Moore*”].

³⁶ I do not have data on the pattern of results when claims of discrimination in violation of the Code or the Charter are raised before tribunals other than human rights tribunals. Since rulings like *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] S.C.J. No. 14, [2006] 1 S.C.R. 513 (S.C.C.) have dispersed responsibility for adjudicating equality rights claims across the legal system, the need for empirical research investigating the results reached by other tribunals deciding equality rights issues has taken on increased importance.

claims of discrimination pursuant to section 15 of the Charter and statutory prohibitions on discrimination, respectively. For data on outcomes in cases alleging violations of statutory prohibitions on discrimination, I will focus on Ontario and British Columbia. I have focused on these two provinces because data is readily available in the annual reports of their human rights tribunals, and, because they currently produce a much higher volume of anti-discrimination case law than other Canadian jurisdictions.³⁷

As set out in Table 1 below, the Human Rights Tribunal of Ontario issued 274 final rulings in cases involving new applications from 2009 to 2012. The Tribunal found discrimination in 110, or 40 per cent, of those decisions.

Table 1: Number and Percentage of Human Rights Tribunal of Ontario Rulings Finding Violations of Statutory Equality Rights³⁸

Year	Final Rulings	Discrimination Found	Claimant's Success Rate
2009-10	75	29	39%
2010-11	104	41	39%
2011-12	95	40	42%
Total	274	110	40%

The numbers of final rulings released annually by the British Columbia tribunal is about half of the number in Ontario; the percentage of cases in which claimants have succeeded in establishing

³⁷ B.C. and Ontario have adopted “direct access” models in their respective Human Rights Codes. In a direct access model, applicants alleging discrimination contrary to human rights legislation file their claims directly with the human rights tribunal, rather than with human rights commissions as was previously the case, and remains the case, in most Canadian jurisdictions. In a direct access model, commissions no longer have the power to dismiss applications, and all cases proceed to a hearing before the tribunal. The result is a significant increase in the number of rulings, and likewise a significant increase in the B.C. and Ontario tribunals’ contributions to equality rights jurisprudence.

³⁸ The statistics presented in this table are drawn from the annual reports of the Human Rights Tribunal of Ontario. See Human Rights Tribunal of Ontario, *Annual Report 2009-10*, at 5; Social Justice Tribunals of Ontario, *2010-11 Annual Report*, at 34, online: <<http://www.sjto.gov.on.ca/stellent/groups/public/@abcs/@www/@sjc/documents/abstract/ec160192.pdf>>; Social Justice Tribunals of Ontario, *2011-12 Annual Report*, online: <<http://www.sjto.gov.on.ca/stellent/groups/public/@abcs/@www/@sjc/documents/abstract/ec162265.pdf>>. See also Andrew Pinto, *Report of the Ontario Human Rights Review 2012* (November 2012), at 213 (“Appendix E: Tribunal Statistics”), online: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/Pinto_human_rights_report_2012-ENG.pdf.

discrimination is very similar. As presented in Table 2 below, from 2003 (the year the “direct access” model came into force in that province) to 2012, the B.C. Human Rights Tribunal has issued 439 final rulings and found discrimination in 181, or 41.2 per cent, of those rulings.

Table 2: Number and Percentage of B.C. Human Rights Tribunal Rulings Finding Violations of Statutory Equality Rights³⁹

Year	Final Rulings	Discrimination Found	Claimant's Success Rate
2003-04	23	15	68%
2004-05	39	19	48%
2005-06	53	21	40%
2006-07	76	28	36%
2007-08	45	15	33%
2008-09	72	26	36%
2009-10	48	20	42%
2010-11	38	18	47%
2011-12	45	19	42%
Total	439	181	41.2%

In a database I have compiled that includes all reported court rulings I have found (through comprehensive searches on Quicklaw and CanLII) that disposed of section 15 claims, the courts have found violations of section 15 in 138, or 16.4 per cent, of 841 reported cases from January 1, 1990 to the time of writing (August 1, 2013). Unlike the stable claimants' success rate before the B.C. and Ontario human rights tribunals presented in Tables 1 and 2, the success rate of section 15 claimants has declined sharply in recent years. Indeed, as indicated in Table 3 below, Charter equality rights claimants' success rate dropped to 11.6 per cent of reported cases in the five-year period from 2005 to 2009, and has fallen even further since then, to 7.2 per cent.

³⁹ The statistics presented in this table are drawn from the annual reports of the B.C. Human Rights Tribunal, online: <http://www.bchrt.bc.ca/annual_reports/index.htm>. See B.C. Human Rights Tribunal, *Annual Report 2003-04*, at 13, *Annual Report 2004-05*, at 16, *Annual Report 2005-06*, at 14, *Annual Report 2006-07*, at 17, *Annual Report 2007-08*, at 18, *Annual Report 2008-09*, at 21, *Annual Report 2009-10*, at 19, online, *id.*, *Annual Report 2010-11*, at 12, and *Annual Report 2011-12*, at 11.

Table 3: Number and Percentage of Court Rulings Finding Violations of Constitutional Equality Rights⁴⁰

Years	Dispositions of Section 15 Claims	Unjustified Violation of Section 15 Found	Claimant's Success Rate
1990-1994	190	29	15.3%
1995-1999	170	37	21.7%
2000-2004	188	41	21.8%
2005-2009	224	26	11.6%
2010-2013 ⁴¹	69	5	7.2%
Total	841	138	16.4%

The small number of court rulings finding violations of Charter equality rights over the course of the last decade is striking. As Taufiq Hashmani and I observed in 2010, “to say that *Charter* equality rights are not in judicial vogue is an understatement”.⁴² Judges have not shown any greater enthusiasm for Charter equality rights since then.

In light of the lack of recent success achieved by section 15 claimants, and the significant costs involved in launching section 15 court challenges, it is not surprising that the number of Charter equality claims brought to the courts annually is declining precipitously. The number of reported rulings by courts disposing of section 15 claims hovered around 40 annually from 1990 to 2009. Since then the number of section 15 rulings issued by the courts has dropped by more than half. In the three-year period from 2010 to 2012, the courts issued final rulings in 47 section 15 cases, an average of 16 annually.

The B.C. and Ontario human rights tribunals are issuing many more final rulings on statutory equality rights than Canadian courts are issuing rulings on constitutional equality rights, and are upholding statutory equality rights claims at more than five times the current rate that the

⁴⁰ The data presented in this table is drawn from the author's database of all reported court rulings finding a s. 15 claim to be established or not established. In cases where a s.15 claim is raised, but not decided by a court, it is not included in the database. When a s. 15 case is appealed, only the final appellate disposition of a s. 15 claim is included in the database.

⁴¹ This number includes rulings reported as of August 1, 2013.

⁴² Bruce Ryder & Taufiq Hashmani, “Managing *Charter* Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010” (2010) 51 S.C.L.R. (2d) 505, at 537 [hereinafter “Ryder & Hashmani”].

courts are finding unjustified violations of Charter equality rights.⁴³ Because of the small number of court rulings on section 15 of the Charter, and the higher volume of rulings being issued by human rights tribunals (led by Ontario and B.C.), the decisions of human rights tribunals interpreting statutory prohibitions on discrimination (and by courts on appeal or judicial review) are currently exerting the primary influence on the development of anti-discrimination law as a whole. At the tribunal level in Ontario and B.C., the influence consists of a relatively evenly balanced mix of decisions in favour of claimants and respondents (whether that remains true in the courts on appeal or judicial review is a question that deserves investigation). Court rulings interpreting section 15 of the Charter, on the other hand, are relatively modest in number and the vast majority — over 90 per cent in the last three years — find in favour of respondents. The numbers raise a concern that a one-sided Charter law and practice might be placing significant barriers in the way of section 15 claims, and may be acting as a brake on the relatively more balanced tribunal jurisprudence. The high cost of putting together the evidence and legal arguments necessary to support a compelling constitutional equality rights claim, and the cancellation of the Court Challenges Program in 2006, are no doubt factors that help explain the small numbers of recent section 15 case law.

A word of caution is in order. The data presented above provides us with a useful glimpse into the volume and patterns of decision-making in litigation involving statutory equality rights before two provinces' human rights tribunals and constitutional equality rights in the courts, respectively. It would be a mistake to use this data to support the conclusion that claims of discrimination have a much higher chance of success in the statutory human rights system than under the Charter. This may be the case, and it may be the general impression left with potential litigants and their legal counsel surveying the track record of courts and tribunals adjudicating equality rights. However, we cannot draw that conclusion based solely on the disparity in the rates that human rights tribunals and courts have upheld allegations of discrimination in their final rulings.

⁴³ The pattern of results in human rights tribunal rulings has been presented here for only two jurisdictions. Every Canadian jurisdiction has human rights legislation prohibiting discrimination. Further research is needed to provide a fuller national picture of the results of human rights tribunal adjudication across the country. As noted, the direct access models in force in B.C. and Ontario give rise to a high volume of tribunal rulings. The number of human rights tribunal rulings in other Canadian jurisdictions is much smaller, particularly in the less populous provinces. Further research could explore whether the success rate of claimants varies between jurisdictions.

The data I have presented is restricted to claims that have proceeded to a tribunal hearing under the Human Rights Codes and to a court ruling on section 15 of the Charter, respectively. Because of the procedural, evidentiary and substantive differences between the two bodies of anti-discrimination law, comparing equality rights claimants' success rates in final tribunal rulings and section 15 court rulings is like comparing apples and oranges.

To take one difference, claims that proceed to a hearing and a final ruling by a human rights tribunal are focused exclusively on establishing discrimination and must have at least some merit, otherwise they would have been dismissed summarily at an earlier stage of the proceedings. In contrast, many section 15 claims raised in court are put forward as alternatives to the principal legal arguments, often by litigants clutching at legal straws (for example, claimants facing deportation in immigration proceedings) without adequate evidence or legal argument. Moreover, the numbers presented in Table 3 include all court rulings dismissing section 15 claims (whether on motions or in final rulings), while the numbers presented in Tables 1 and 2 do not include summary dismissal rulings by the B.C. and Ontario human rights tribunals in the statutory human rights context. We should not be surprised, then, that the data I have presented shows that equality rights claimants have a much higher success rate in *final* rulings by human rights tribunals than when they allege violations of section 15 of the Charter in court. We need to conduct more thorough investigation before drawing conclusions about claimants' comparative success rates in the statutory and constitutional realms. To enable us to draw such conclusions, ideally future empirical research will examine all equality rights claims entering each system and their ultimate disposition at various stages of each process.

The plummeting number and success rate of section 15 claims depicted in Table 3 is cause for concern in a society still riven by deep structural inequalities on the basis of sex, race, ability and other prohibited grounds of discrimination. The data provides strong support to the argument made by some critical socio-legal scholars that many forms of inequality are beyond the reach of constitutional rights discourse and litigation.⁴⁴ We have to be careful not to burden section 15 litigation with unrealistic expectations: section 15 promises much, but has delivered little, at least in direct litigation outcomes in the past decade. In the

⁴⁴ See, e.g., Harry Arthurs & Brent Arnold, "Does the *Charter* Matter?" (2005) 11 Rev. Const. Studies 37.

current political and legal environment, even when the potential impacts of section 15 claims are modest, and even when claims are supported by strong legal arguments and a strong evidentiary record, the odds of success in court are long. Claimants who are successful in challenges to laws in lower courts have to be prepared for a long battle and potential reversal on appeal. Consider, for example, that *Quebec v. A.* is the 10th section 15 ruling in a row from the Supreme Court of Canada that found for the respondent (that is, that rejected the claimant's allegation that the government unjustifiably violated his or her equality rights).⁴⁵ In three of those 10 rulings,⁴⁶ the Court overturned appeal court rulings finding an unjustified violation of section 15. Meanwhile, the Court has denied leave to appeal to a number of cases where important section 15 claims were rejected by courts of appeal.⁴⁷ As Taufiq Hashmani and I have found, respondents in section 15 cases are far more likely than claimants to be granted leave to appeal to the Supreme Court of Canada, and far more likely to be successful on appeal.⁴⁸ When the Court has granted leave to appeal in section 15 cases in recent years, it has affirmed its commitment to interpreting section 15 in accordance with the objective of promoting substantive equality and then has invariably proceeded to find allegations of unjustified infringements of section 15 unfounded.⁴⁹ The disparity between the Court's stated commitment to substantive equality and its deeds is disconcerting.

It may be that, at least in some jurisdictions, equality rights claimants are more likely to receive sympathetic hearings from human rights tribunals than they are from the courts because of the human rights expertise of tribunal members, the tribunals' specialized institutional mandate and legal culture, and the lower burdens placed on claimants by human rights tribunals compared to the courts in Charter cases. Whether or not this is

⁴⁵ *Quebec v. A.*, *supra*, note 34; *Cunningham*, *supra*, note 28; *Fraser*, *supra*, note 28; *Withler*, *supra*, note 26; *Hutterian Brethren*, *supra*, note 28; *C. (A.)*, *supra*, note 28; *Ermineskin*, *supra*, note 28; *Kapp*, *supra*, note 25; *Baier v. Alberta*, [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.); and *Health Services*, *supra*, note 28.

⁴⁶ *Quebec v. A.*, *id.*; *Cunningham*, *id.*; *Hutterian Brethren*, *id.*

⁴⁷ See the cases discussed in Ryder & Hashmani, *supra*, note 42, at 528-30. One of the most recent examples is *Pratten v. British Columbia*, [2012] B.C.J. No. 2460, 357 D.L.R. (4th) 660 (B.C.C.A.) (dismissing a challenge to the provisions of the B.C. *Adoption Act*, R.S.B.C. 1996, c. 5 that give no rights to information about their biological fathers to persons conceived through donor insemination), application for leave to appeal to the Supreme Court of Canada dismissed, May 30, 2013.

⁴⁸ *Id.*, at 525-32.

⁴⁹ *Id.*, at 533.

true, an impression to that effect has been created by the pattern of decision-making in final rulings described above.

As a result, some equality rights claimants are voting with their feet, eschewing the Charter, and filing claims with human rights tribunals instead. Human rights tribunals are increasingly being asked to consider claims that aim to transform government laws and policies of general application — claims, like *Moore*, that look and feel like traditional Charter challenges. These claims are possible under Human Rights Codes because their prohibitions on discrimination in services extend to much of what government does. Claire Mummé has traced the expansion since the 1980s of the definition of what counts as a service, resulting in a huge area of overlap in the application of the Charter and statutory Human Rights Codes.⁵⁰ As Mummé notes, this growing area of overlap has precipitated a debate on whether the tests for establishing discrimination in the statutory and constitutional realms ought to merge. If courts and tribunals are essentially dealing with the same issues, the argument goes, then the strange double life of Canadian equality rights should come to an end. The test for determining whether discrimination has been established should be the same in both realms.

III. TOWARDS A COMMON TEST FOR ESTABLISHING DISCRIMINATION

1. Should the Test for Discrimination Differ in the Statutory and Constitutional Contexts? Three Approaches

While discussions about the relationship between the statutory and constitutional definitions of discrimination are as old as section 15 itself, they took on added urgency after 1999, when the *Law* and *Meiorin* rulings set the jurisprudence in the two realms on separate paths. Three approaches have dominated debates on the issue: one advocates a harmonized approach that applies the Charter test in all equality rights litigation; a second seeks to maintain distinct tests in the statutory and constitutional contexts; and a third supports a harmonized approach that applies the *O'Malley* test in all equality rights litigation.

Respondents' counsel have pushed hard for the first approach, arguing that there are no principled reasons for taking different approaches to

⁵⁰ Claire Mummé, "At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the *Charter* in Canadian Government Services Cases" (2012) 9 J.L. & Equality 103.

the definition of discrimination in the statutory and constitutional realms. Given the common underlying principles and objectives that have shaped section 15 of the Charter and human rights codes, the case for a uniform test of discrimination is a powerful one, as the Court has recognized ever since *Andrews*. As more challenges to government laws and policies are initiated before tribunals rather than courts, governments have urged that the section 15 test, as articulated in *Law*, and later as articulated in *Kapp*, should migrate with them. Claire Mummé has succinctly described the impetus behind this line of argument:

The expanding reach of human rights statutes suggests that its adjudicators now rival the superior courts as sites for public law adjudication. ... it is perhaps also exactly for this reason that the door has opened to the use of constitutional jurisprudence in the statutory framework and that judicial decision makers have been receptive to claims of merger between these two instruments. Put simply, ... a new unease has emerged with using an administrative tribunal to review legislative and executive decisions under a less deferential standard than is brought to the same questions under the *Charter*.⁵¹

Despite the energy and skill government lawyers (and other respondents' counsel) have put into advancing this position, they have had limited success. The problem is that, even if we accept the strong arguments they have presented for conceptual unity, they have not been able to make a persuasive case for why the more burdensome Charter test, rather than the *O'Malley* test, should be the one that prevails. The test that should be adopted is the one that holds the most promise for advancing the underlying purpose of Canadian anti-discrimination law, the promotion of substantive equality. The Supreme Court has recognized, beginning in *Kapp*, that the Charter definition of discrimination has proven overly burdensome to claimants and has hindered the pursuit of substantive equality. To apply the Charter test to the statutory realm, when the Court has embarked on an attempt to lower the burdens it imposes, would be to compound the problem the Court is trying to solve. While the problems with the Charter test are well known and widely accepted, nobody has made a persuasive case that the *O'Malley/Meiorin* tests and allocations of burdens are operating unfairly for applicants or respondents in the adjudication of statutory claims.

⁵¹ *Id.*, at 137.

The second approach seeks to maintain different tests for establishing discrimination in the constitutional and statutory contexts. A number of scholars have argued in favour of this position.⁵² For these scholars, the strange double life of Canadian equality rights is not so strange after all; it is explained by the different features, legal status and mechanisms of enforcement of Human Rights Codes and the Charter. The primary goal of this body of scholarship has been to defend the lower burden imposed on statutory equality rights claimants by the *O'Malley* test compared to the burdens imposed on section 15 claimants by the *Law* test (or later, the *Kapp* test).

The *O'Malley* test is defended in this literature as best suited to promoting the substantive equality objective of Human Rights Codes: it maintains access to justice by not imposing unrealistic or costly burdens on claimants, and it allocates burdens in accordance with the knowledge and information-gathering capacities of the parties. Because this scholarship is focused on preventing the Charter test from colonizing the statutory realm, it has devoted less attention, and sometimes none at all, to considering whether there is a persuasive rationale for placing higher burdens on equality rights claimants who make constitutional as opposed to statutory claims. As the titles of articles by Andrea Wright and Denise Réaume express it, the goal of this literature has been to “stop the *Charter* at the human rights gate”, or “to defend human rights codes from the *Charter*”.⁵³ This defensive scholarship has not argued for a reconsideration of the Charter test itself.

The problem with the body of scholarship that supports divergent tests for discrimination in the statutory and constitutional realms is that the authors' arguments against importing the more burdensome *Law* or *Kapp* tests into the statutory jurisprudence are equally persuasive reasons for not applying those tests in the constitutional context in the first place. Access to justice concerns are equally if not more profound in the Charter context, given the high costs involved in litigation against the government in court. It makes as much as sense to allocate burdens in accordance with the parties' knowledge and access to relevant facts in the Charter context as it does under Human Rights Codes. While supporters of divergent approaches to discrimination point to differences in the legal

⁵² See MacKay, *supra*, note 29; Réaume, *supra*, note 29; Oliphant, *supra*, note 29; Bisgould, *supra*, note 29; Reaume, *supra*, note 29; Wright, *supra*, note 29; Schucher & Keene, *supra*, note 29.

⁵³ Wright, *id.*; Réaume, *id.*

status, design and reach of Human Rights Codes and section 15, it is not clear why any of those differences should impose higher burdens on claimants seeking to demonstrate discrimination in constitutional cases. Section 1 affords all of the flexibility courts need in balancing the protection of Charter rights and freedoms with the achievement of pressing government objectives.

A third perspective accepts the desirability of adopting a common test for establishing discrimination in both the statutory and constitutional spheres, but sees the *O'Malley* test, as subsequently refined and developed in the case law interpreting human rights legislation, rather than the tests put forward in the section 15 jurisprudence, as the normative position around which anti-discrimination law should coalesce. Many scholars have argued that a major flaw of the courts' section 15 jurisprudence is that it imports issues into the claimant's burden of establishing discrimination that ought to be addressed as part of the government's burden of justification under section 1.⁵⁴ The solution is to require equality rights claimants to prove differential treatment on the basis of a prohibited ground that imposes disadvantage in a *prima facie* sense, at which point the burden shifts to the government to attempt to justify the challenged law or policy pursuant to section 1.⁵⁵ This approach is essentially identical to the *O'Malley/Meiorin* tests and the division of evidentiary burdens that operates in the statutory realm.

A potential danger with the third approach is that it casts section 15's net too broadly in a manner that overshoots its substantive equality purpose. Writing in 2002, Arbour J. cautioned that a broad interpretation of section 15 risked diluting the power of equality rights, and producing a section 1 test that lacked rigour:

⁵⁴ See, e.g., Beverley Baines, "Law v. Canada: Formatting Equality" (2000) 11 Const. Forum 65, at 72; Christopher Brecht & Adam Dodek, "Breaking the Law's Grip on Equality: A New Paradigm for Section 15" (2003) 20 S.C.L.R. (2d) 33, at 54 [hereinafter "Brecht & Dodek"]; Donna Greschner, "Does Law Advance the Cause of Equality?" (2001) 27 Queen's L.J. 299, at 306; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003) 48 McGill L.J. 627; Caroline Hodes, "Dignity and the Conditions of Truth: What Equality Needs from Law" (2007) 19 C.J.W.L. 273, at 282; Peter W. Hogg, *Constitutional Law of Canada* (Scarborough, ON: Carswell, 2007), student ed., at 1154-55; Jennifer Koshan & Jonette Watson Hamilton, "Meaningless Mantra: Substantive Equality After Withler" (2011-2012) 16 Rev. Const. Studies 31, at 58; MacKay, *supra*, note 29; Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006), at 95; Paul-Erik Veel, "A New Direction in the Interpretation of Section 15(1)? A Case Comment on *R. v. Kapp*" (2008) 6:1 J.L. & Equality 33.

⁵⁵ See, e.g., Brecht & Dodek, *id.*, at 54.

We must be careful, in our understandable eagerness to extend equality rights as widely as possible, to avoid stripping those rights of any meaningful content. Lack of care can only result in the creation of an equality guarantee that is far-reaching but wafer-thin, an expansive but insubstantial shield with which to fend off state incursions on our dignity and freedom.⁵⁶

One answer to this concern is to insist that the *O'Malley* definition of discrimination operate in both statutory and constitutional contexts in a manner that is attentive to the substantive equality purpose of Canadian anti-discrimination law. The burdens imposed by the *O'Malley* test are appropriate for the adjudication of claims by members of historically disadvantaged groups, as the government should have to justify the imposition of further disadvantage on those groups on the basis of prohibited grounds of discrimination. When equality rights claims are brought by members of relatively advantaged groups, we can fairly ask for evidence of substantive discrimination beyond the imposition of adverse differential treatment on the basis of a prohibited ground.

In any case, Arbour J.'s concern that equality rights not be defined too broadly does not resonate in the current context. The recent judicial record gives rise to the opposite concern. As we have seen, fewer and fewer section 15 claims are litigated, and, when they are, fewer and fewer litigants succeed in putting governments to the test of justification. A more expansive approach to section 15 is necessary to rescue it from oblivion.

The debate on whether the tests for discrimination in the statutory and constitutional realms should be harmonized was an important part of the submissions made to the Court in *Moore*. Much of the factum of intervener West Coast LEAF, for example, was devoted to defending the statutory realm from being infiltrated by the more burdensome Charter test of discrimination (the second approach described above).⁵⁷ Another intervener, the Canadian Constitution Foundation ("CCF"), succinctly presented the case for harmonizing the divergent definitions of

⁵⁶ *Lavoie v. Canada*, [2002] S.C.J. No. 24, [2002] 1 S.C.R. 769, at para. 86 (S.C.C.). See also the concerns about an understanding of equality rights that is too broad and too shallow expressed by Denise Réaume in "The Relevance of Relevance to Equality Rights" (2006) 31 *Queen's L.J.* 696.

⁵⁷ Factum of the Intervener West Coast Women's Legal and Education Action Fund, online: <<http://www.westcoastleaf.org/userfiles/file/Intervener%20West%20Coast%20LEAF%20Factum.pdf>>, at paras. 10-26.

discrimination by making the Charter test applicable in the statutory realm (the first approach described above).⁵⁸

In a telling moment during oral argument in *Moore*, counsel for the CCF, Ranjan Agarwal, submitted that “the elephant in the room in this case” is the relationship between the constitutional and statutory tests for discrimination. He submitted that “this Court in its reasons should find that the test for discrimination under the *Charter of Rights and Freedoms* is the same as the test for discrimination under the *Human Rights Code*”.⁵⁹ To which Abella J. interjected: “we’ve been saying that since *Andrews*”. Mr. Agarwal replied that the situation was not so clear to lower courts and tribunals. In forceful submissions, he urged the Court to take the opportunity in its reasons in *Moore* to clarify the law by expressly adopting a harmonized approach. Justice Abella remained puzzled by these submissions, insisting that “there is no different test for what discrimination means”.⁶⁰ Mr. Agarwal, in other words, urged the Court to move from the second to the first approach described above. Justice Abella, in her comments, made it clear she is no supporter of the strange double life of Canadian equality rights. Justice Abella believes the law does and should embody a harmonized approach. As it turns out, the harmonized approach she supports is just not the one Mr. Agarwal was urging upon her. She favours the third approach described above. Her opinions in *Moore* and *Quebec v. A.*, as we shall see in the next section, affirmed the operation of the *O’Malley* test for determining discrimination in the statutory context, and moved the constitutional test closer to it.

2. *Moore* and *Quebec v. A.*: Convergence in the Tests for Establishing Discrimination

At issue in *Moore* was whether a school district and the B.C. Ministry of Education had discriminated against a student with a severe learning disability, Jeffrey Moore, by failing to provide him with the intensive remedial instruction he needed for his dyslexia in his early school

⁵⁸ Factum of the Intervener Canadian Constitution Foundation, online: <<http://www.canadianconstitutionfoundation.ca/files/31/Factum%20of%20the%20Intervener%20-%20Moore.pdf>>, at paras. 5-9.

⁵⁹ See the segment of the webcast of the oral argument in *Moore v. British Columbia* beginning at 295:30, available at the Supreme Court of Canada website, online: <<http://www.scc-csc.gc.ca/case-dossier/info/webcast-webdiffusion-eng.aspx?cas=34040>>.

⁶⁰ *Id.*, at 303:00.

years. Before the B.C. Human Rights Tribunal, Mr. Moore argued that the *O'Malley* test should be followed to determine whether the school district and the province had discriminated against him.⁶¹ The government respondents argued that the *Law* “human dignity” test used to interpret section 15 of the Charter at the time should apply because the case “involved government action and allegations of systemic discrimination in the context of broad public policy issues in education”.⁶² As mentioned above, this is a common strategy: governments and other respondents have been trying to import the more burdensome constitutional test for discrimination into the statutory realm for some time.

Tribunal Chair Heather MacNaughton acknowledged the existence of uncertainty about whether the constitutional test articulated in *Law* applied in the statutory realm. She therefore decided to apply both the *O'Malley* and the *Law* tests, and concluded that a *prima facie* case of discrimination had been established regardless of the test applied.⁶³ She went on to find that the respondents had not met their burden of justifying the denial of intensive remedial instruction to Mr. Moore.

On judicial review, uncertainty about the applicable legal test continued. At the B.C. Superior Court, the Tribunal decision was reversed. Relying heavily on Charter rulings such as *Auton*,⁶⁴ Dillon J. found that “[t]he Tribunal’s failure to identify and then to compare the appropriate comparator group [other special education students] crucially tainted the whole of the discrimination analysis”.⁶⁵ On appeal to the B.C. Court of Appeal, Mr. Moore’s appeal was dismissed.⁶⁶ Citing the Charter case law on mirror comparator groups (since repudiated by *Withler*),⁶⁷ the majority opinion of Low J.A. agreed with Dillon J. that it was necessary for the analysis to be shaped by an appropriate comparator group. In this case, the appropriate comparator group was “special needs students other than

⁶¹ *Moore v. British Columbia (Ministry of Education)*, [2005] B.C.H.R.T.D. No. 580, 54 C.H.R.R. D/245, at para. 719 (B.C.H.R.T.).

⁶² *Id.*, at para. 722.

⁶³ *Id.*, at para. 740.

⁶⁴ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 (S.C.).

⁶⁵ *British Columbia (Ministry of Education) v. Moore*, [2008] B.C.J. No. 348, 81 B.C.L.R. (4th) 107, at para. 147 (B.C.S.C.).

⁶⁶ *British Columbia (Ministry of Education) v. Moore*, [2010] B.C.J. No. 2097, 326 D.L.R. (4th) 77 (B.C.C.A.) [hereinafter “*Moore CA*”].

⁶⁷ *Supra*, note 26.

those with severe learning disabilities”.⁶⁸ The evidence did not establish differential treatment compared to this group. Justice Low concluded:

Jeffrey Moore and other severely learning disabled students were given the same opportunity to receive a general education as was given to all other students. To compare these students with the general student population is to invite an enquiry into general education policy and its application.⁶⁹

Justice Rowles dissented. Like the Tribunal, she acknowledged the existence of debate about the applicability of the Supreme Court of Canada’s section 15 jurisprudence to claims of discrimination brought under human rights statutes.⁷⁰ After canvassing the case law and competing views, she concluded that “the proper approach to claims of discrimination under the *Code* is the traditional framework set out in *O’Malley* and subsequently developed by statutory human rights jurisprudence”.⁷¹ She noted that after the abandonment of the “human dignity” test in *Kapp*, “the gap between the *Charter* approach to discrimination and the statutory human rights approach is arguably narrowing once again”.⁷² She agreed with the Tribunal’s finding of *prima facie* discrimination, and concluded that the school district “has not proven that it accommodated Jeffrey and other severely learning disabled students to the point of undue hardship”.⁷³

At the Supreme Court of Canada, Mr. Moore’s appeal was substantially allowed.⁷⁴ Justice Abella wrote a powerful unanimous opinion on behalf of the Court restoring the Tribunal’s finding that the school district had discriminated against Mr. Moore. She strongly rejected the comparator group analysis applied by the B.C. courts. In her words,

Comparing Jeffrey only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler* ...⁷⁵

⁶⁸ *Moore CA, supra*, note 66, at para. 182.

⁶⁹ *Id.*, at para. 183.

⁷⁰ *Id.*, at para. 37.

⁷¹ *Id.*, at para. 51.

⁷² *Id.*, at para. 53.

⁷³ *Id.*, at para. 158.

⁷⁴ *Moore, supra*, note 35.

⁷⁵ *Id.*, at para. 30 (emphasis in original).

Instead, Abella J. characterized adequate special education services as “the ramp that provides access to the statutory commitment to education made to all children in British Columbia”.⁷⁶ The key question, she wrote, is whether the failure to provide Mr. Moore with intensive remediation “was ... an unjustified denial of meaningful access to the general education to which students in British Columbia are entitled and, as a result, discrimination”.⁷⁷

In answering this question, Abella J. stated that the Tribunal had properly applied the *O'Malley/Meiorin* test:

As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.⁷⁸

Justice Abella made no mention of the fact that the Tribunal had also applied the *Law* test. In fact, she made no reference at all to the *Law* or the *Kapp* tests in her reasons. The words “human dignity”, “prejudice” or “stereotype” — words that have so bedevilled the Supreme Court of Canada’s constitutional equality rights jurisprudence — are nowhere to be found in Abella J.’s opinion in *Moore*. It would have been better if she had stated explicitly that the additional requirement that constitutional equality rights claimants have had to establish — a violation of human dignity (from 1999 to 2008 in the *Law* era), or the perpetuation of disadvantage through the operation of prejudice or stereotyping (2008 to 2013 in the *Kapp* era) — should not be part of the claimant’s burden in the statutory realm. But such an additional burden has never been part of the Court’s statutory equality rights jurisprudence,⁷⁹ so Abella J. may have considered an affirmative statement along those lines unnecessary, even though she had been urged to address the issue in the submissions described above. In any case, a few months later, as we shall see in our discussion of *Quebec v. A.* below, Abella J. held that proof of the

⁷⁶ *Id.*, at para. 5.

⁷⁷ *Id.*, at para. 32.

⁷⁸ *Id.*, at para. 33.

⁷⁹ See the review of the jurisprudence in Oliphant, *supra*, note 29.

operation of prejudice or stereotyping is no longer a requirement that must be met to establish violations of section 15 of the Charter.

Applying the *O'Malley* test, Abella J. had no difficulty finding that Mr. Moore had a disability (dyslexia), and that the adverse impact he endured was related to his disability.⁸⁰ She went on to conclude that he was denied meaningful access to a service (the general education available to the public) on the basis of his disability, because the remediation provided by the school district “was far from adequate to give Jeffrey the education to which he was entitled”.⁸¹

Turning to the issue of justification, the question was whether the school district had demonstrated that there were no reasonable or practical alternatives to the denial of intensive remediation services to Mr. Moore in light of the budgetary crisis it faced.⁸² Justice Abella concluded that the school district had not met its burden, as special needs programs were cut disproportionately and not accorded the constitutional priority they deserved.⁸³ Moreover, “the District undertook *no* assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed”.⁸⁴ This failure undermined the school district’s argument that budgetary constraints prevented it from providing meaningful access to education to Mr. Moore: “[i]n order to decide that it had *no* other choice, it had at least to consider what those other choices were”.⁸⁵

The finding of discrimination against the District was thus confirmed unanimously by the Supreme Court of Canada. Justice Abella upheld the Tribunal’s award of monetary damages to the Moores for the costs of the private special education they had to incur and for the injury to Jeffrey’s “dignity, feelings and self-respect”.⁸⁶ She reversed the Tribunal’s systemic orders directed at the school district and the provincial government, finding them too remotely related to the finding of discrimination against Jeffrey.⁸⁷

⁸⁰ *Moore, supra*, note 35, at para. 34.

⁸¹ *Id.*, at para. 41.

⁸² *Id.*, at para. 49.

⁸³ *Id.*, at para. 51.

⁸⁴ *Id.*, at para. 52.

⁸⁵ *Id.* (emphasis in original).

⁸⁶ *Id.*, at para. 56.

⁸⁷ *Id.*, at paras. 57-66.

The *Moore* ruling is the most powerful ruling on equality rights from the Court since its rulings in the late 1990s in *Eldridge*⁸⁸ and *Vriend*.⁸⁹ Justice Abella's opinion is eloquent, succinct and compelling. The Court was united around her application of settled jurisprudence. As a result, the Court in *Moore* was able to provide clear guidance to school boards regarding their obligations to prioritize available resources to promote equal access to educational services for persons with disabilities, just as the *Eldridge* ruling had clarified hospitals' obligations to provide equal access to public health care services to the hearing impaired. Moreover, Abella J.'s restatement and application of the *O'Malley* test for discrimination, carefully omitting any reference to the leading cases setting out the test for discrimination in the Charter context, and carefully omitting the terminology (human dignity, prejudice, stereotype) that has imposed added burdens on equality rights claimants in section 15 cases, provides a clear indication to lower courts that they should do the same. Lower courts and tribunals no longer need to worry about whether to incorporate proof of a violation of "human dignity" or "the perpetuation of disadvantage through the operation of prejudice or stereotyping" into the statutory test for discrimination. To the extent that earlier lower court or tribunal rulings did incorporate this added burden into the statutory test for discrimination, such as the Ontario Court of Appeal ruling in *Tranchemontagne*,⁹⁰ they are no longer reliable statements of the law in light of the Court's rulings in *Moore* and *Quebec v. A*.

The Court's other recent equality rights ruling in the case of *Quebec v. A*.⁹¹ is more complicated and its implications less clear, because the judges were closely divided and wrote four separate opinions. At issue were provisions of the Quebec *Civil Code*⁹² that accord rights to spousal support, the family residence, the family patrimony, the compensatory allowance and the partnership of acquests only to married spouses or to persons in civil unions. The claimant Ms. A had lived with Mr. B for seven years in a conjugal relationship. They had three children together. She wanted to marry, but he refused. When they separated, Ms. A found herself without access to the spousal support and property rights in the

⁸⁸ *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.).

⁸⁹ *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.).

⁹⁰ *Supra*, note 29.

⁹¹ *Supra*, note 34.

⁹² *Civil Code of Quebec*, S.Q. 1991, c. 64.

Civil Code. She brought a challenge to the provisions of the *Civil Code* on constitutional grounds.

Was it discrimination on the basis of marital status, and thus an infringement of section 15(1) of the Charter, for the Quebec National Assembly to exclude *de facto* spouses (that is, unmarried couples living together in conjugal relationships) from these statutory rights? If so, could the government justify the infringement pursuant to section 1 of the Charter?

If we were to apply the *O'Malley* test from the statutory realm for determining violations of section 15(1), the claimant would have to establish that the challenged provisions imposed adverse differential impact on the basis of the prohibited ground of marital status (which has been recognized by the Court as analogous to the other grounds listed in section 15). This was the straightforward and well-established approach around which the Court united in *Moore*. Then the burden could quickly shift to the government to rebut the *prima facie* case of discrimination by establishing a justification in accordance with section 1 of the Charter.

But no such luck. *Quebec v. A.* was a constitutional equality rights case. A set of anxieties not present in the statutory jurisprudence apparently were summoned forth. The Court in *Quebec v. A.* produced a lengthy and complicated ruling featuring four separate opinions that cumulatively consumed 450 paragraphs. The opinions resulted in two closely divided rulings on the section 15(1) and section 1 issues, respectively, that revealed a starkly gendered division among the judges.

First, a 5-4 majority, featuring a lead opinion written by Abella J., and two separate concurring opinions written by Deschamps J. (joined by Cromwell and Karakatsanis JJ.) and the Chief Justice, found that the impugned provisions of the *Civil Code* discriminated on the basis of marital status and thus infringed section 15(1) of the Charter. In other words, the four women on the Court, joined by Cromwell J., found the denial of rights to *de facto* spouses to be discriminatory. The four other men on the Court dissented in an opinion written by LeBel J. (Fish, Rothstein and Moldaver JJ. concurring). Justice LeBel's dissent is remarkable both for its length (282 paragraphs) and for its conclusion that none of the challenged provisions infringe section 15(1) because they do not express or perpetuate prejudice or stereotyping. Justice LeBel's dissent should stand as a reminder why members of disadvantaged groups should be relieved of the burden of proving that the disadvantage imposed on them by the government operated through prejudice or stereotyping.

Second, a differently constituted 5-4 majority affirmed the validity of the challenged provisions. The majority in the result consisted of LeBel J.'s opinion for four members of the Court that the impugned provisions of the *Civil Code* did not infringe section 15(1) and the Chief Justice's conclusion that the infringement of section 15(1) could be justified pursuant to section 1, because "the Quebec law falls within a range of reasonable alternatives for maximizing choice and autonomy in the matter of family assets and support".⁹³ In their dissenting opinions on the section 1 issues, Abella J. would have found none of the impugned provisions to be justified, and Deschamps J. (Cromwell and Karakatsanis JJ. concurring) would have found them all to be justified apart from the provision dealing with spousal support rights.

The Court's opinions in *Quebec v. A.* raise a multitude of interesting questions. Here, I will focus only on what members of the Court had to say about the approach to the claimant's burden in establishing an infringement of section 15(1). As noted above, in *Kapp* the Court committed to relieving the undue burdens its previous jurisprudence had placed on claimants asserting violations of their constitutional equality rights. It did so by eliminating the need to prove a violation of human dignity. The Court continued the project of reducing the burdens placed on section 15(1) claimants in *Withler* by eliminating the need to structure the discrimination analysis around a single "mirror comparator group". The test put forward by the majority in *Quebec v. A.* continues the post-*Kapp* trajectory of alleviating the burdens on section 15(1) claimants, and calling on the government to justify, pursuant to section 1 of the Charter, laws or policies that have the effect of imposing adverse differential treatment on the basis of prohibited grounds on members of historically disadvantaged groups.

As discussed above, prior to the Court's ruling in *Quebec v. A.*, the test for determining violations of section 15(1) was set out in *Kapp* and *Withler* as follows: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"⁹⁴ In her opinion for the majority on section 15(1), Abella J. reformulated this test in several important ways.

First, Justice Abella stated that, contrary to the impression left in *Kapp* and *Withler*, the claimant is not required to prove that the challenged

⁹³ *Supra*, note 34, at para. 447.

⁹⁴ *Supra*, note 33.

law perpetuates prejudice or stereotyping.⁹⁵ Rather, “[p]rejudice and stereotyping are two of the indicia that may help answer” whether the challenged law violates substantive equality; “they are not discrete elements of the test which the claimant is obliged to demonstrate”.⁹⁶

Second, she resolved an ambiguity in the earlier case law about the meaning of the word “prejudice”. Sometimes, the Court appeared to use the word “prejudice” as a synonym for “disadvantage” (as in, “does the challenged law impose prejudice or disadvantage on the claimant?”). On other occasions, the Court appeared to use prejudice as meaning a discriminatory bad attitude. In *Quebec v. A.*, Abella J. clearly opted for the latter meaning. She defined prejudice as follows:

Prejudice is the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member. Stereotyping, like prejudice, is a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities. Attitudes of prejudice and stereotyping can undoubtedly lead to discriminatory conduct, and discriminatory conduct in turn can reinforce these negative attitudes ...⁹⁷

While the proof that differential treatment on a prohibited ground perpetuates prejudicial or stereotypical attitudes will be sufficient to establish discrimination, it is not necessary.⁹⁸ Justice Abella noted that such a requirement would impose an “unquantifiable” or “ineffable” burden on claimants.⁹⁹ The focus, she said, should remain resolutely on the impact of the challenged law.¹⁰⁰

Third, drawing on *Kapp* and *Withler*, Abella J. clarified the other way, apart from proving the perpetuation of prejudice or stereotype, that a section 15(1) claimant may establish discrimination: by showing that the challenged differential treatment on the basis of a prohibited ground imposes a disadvantage on the claimant as a member of a group that has experienced a history of disadvantage:

The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such

⁹⁵ *Quebec v. A.*, *supra*, note 34, at para. 325.

⁹⁶ *Id.*

⁹⁷ *Id.*, at para. 326.

⁹⁸ *Id.*, at para. 327.

⁹⁹ *Id.*, at paras. 329-330.

¹⁰⁰ *Id.*, at para. 328.

discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.¹⁰¹

Justice Abella emphasized that a consideration of the purpose of the challenged provisions — whether they are well-motivated or reasonable in their promotion of the autonomy of *de facto* spouses, for example — properly belongs at the section 1 stage of the analysis.¹⁰² For this reason, she and the other members of the section 15(1) majority declined to follow the Court's ruling in *Walsh*¹⁰³ to the effect that Nova Scotia legislation extending family property rights only to married spouses did not violate the section 15(1) rights of unmarried couples.¹⁰⁴

After clarifying and adjusting the section 15(1) test in these ways, Abella J. was able to quickly conclude that the impugned provisions infringed section 15(1). The law imposed disadvantageous treatment based on marital status on a group — *de facto* spouses — that had experienced historic disadvantage. Some *de facto* spouses were in relationships functionally similar to some marriages, giving rise to similar forms of economic vulnerability. This was enough for Abella J. to conclude that an infringement of section 15(1) was established:

The National Assembly enacted economic safeguards for spouses in formal unions based on the need to protect them from the economic consequences of their assumed roles. Since many spouses in *de facto* couples exhibit the same functional characteristics as those in

¹⁰¹ *Id.*, at para. 332.

¹⁰² *Id.*, at paras. 333, 335.

¹⁰³ *Nova Scotia (Attorney General) v. Walsh*, [2002] S.C.J. No. 84, [2002] 4 S.C.R. 325 (S.C.C.) [hereinafter "*Walsh*"].

¹⁰⁴ *Quebec v. A.*, *supra*, note 34, at para. 338, *per* Abella J; at para. 384, *per* Deschamps J; and at para. 422, *per* McLachlin C.J.C. Justice Bastarache held in *Walsh*, *id.*, that the provisions of the Nova Scotia *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 did not discriminate on the basis of marital status by excluding unmarried couples from the statutory rights set out in the Act. Justice Bastarache found that the legislation was not discriminatory because it was aimed at respecting the choices made by married and unmarried conjugal couples. He summarized his conclusion at para. 62:

[T]he extension of the *MPA* to married persons only is not discriminatory in this case as the distinction reflects and corresponds to the differences between those relationships and as it respects the fundamental personal autonomy and dignity of the individual. In this context, the dignity of common law spouses cannot be said to be affected adversely. There is no deprivation of a benefit based on stereotype or presumed characteristics perpetuating the idea that unmarried couples are less worthy of respect or valued as members of Canadian society. All cohabitants are deemed to have the liberty to make fundamental choices in their lives. The object of s. 15(1) is respected.

Since a majority of the Supreme Court "declined to follow" the s. 15(1) analysis in *Walsh*, Bastarache J.'s conclusion on the s. 15(1) issue has been effectively overruled.

formal unions, with the same potential for one partner to be left economically vulnerable or disadvantaged when the relationship ends, their exclusion from similar protections perpetuates historic disadvantage against them based on their marital status.¹⁰⁵

In her opinion, Deschamps J. (Cromwell and Karakatsanis JJ. concurring) wrote that she agreed with Abella J.'s section 15(1) analysis.¹⁰⁶ In her brief additional comments, she made clear that establishing differential treatment on a prohibited ground that perpetuates historic disadvantage is sufficient to show an infringement of section 15(1) and to require the government to meet its burden of justification pursuant to section 1. The brevity and clarity of Deschamps J.'s section 15(1) analysis is reminiscent of the relative ease with which the Court found *prima facie* discrimination in cases involving statutory claims, like *Meiorin* and *Moore*. Here is Deschamps J.'s section 15(1) discussion in its entirety:

The exclusion of *de facto* spouses from the protections provided for in the *C.C.Q.* [*Civil Code of Quebec*] perpetuates a historical disadvantage (*Withler*, at paras. 3, 35, 37 and 54). The Court has recognized the fact of being unmarried as an analogous ground because, historically, unmarried persons were considered to have adopted a lifestyle less worthy of respect than that of married persons. For this reason, they were excluded from the social protections. Even though society's perception of *de facto* spouses has changed in recent decades and there is no indication that the Quebec legislature intended to stigmatize them, the denial of the benefits in question perpetuates the disadvantage such people have historically experienced (*Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 152). The Attorney General of Quebec therefore had to justify this distinction.¹⁰⁷

Recall that the *O'Malley* test for *prima facie* discrimination in the statutory realm requires the claimant to show that the challenged rule imposes adverse differential treatment based on a prohibited ground. The majority opinions on section 15(1) of Abella and Deschamps JJ. in *Quebec v. A.* likewise require a section 15(1) claimant to demonstrate adverse differential treatment on a prohibited ground that exacerbates historic disadvantage. Insofar as members of historically disadvantaged groups are concerned, these are essentially the same tests.

¹⁰⁵ *Quebec v. A.*, *supra*, note 34, at para. 356.

¹⁰⁶ *Id.*, at para. 385.

¹⁰⁷ *Id.*

Chief Justice McLachlin, in her separate opinion, was the fifth member of the majority finding a violation of section 15(1). The Chief Justice stated, without qualification, that she was in agreement with “the s. 15 analysis set out in Abella J.’s reasons”.¹⁰⁸ However, in her discussion of why section 15(1) was violated in this case, the Chief Justice’s emphasis on “the point of view of a reasonable person”,¹⁰⁹ and on the “false stereotypes”¹¹⁰ underlying the law, raise some doubt about whether she shares Abella and Deschamps JJ.’s view that the exacerbation of historic disadvantage on the basis of prohibited grounds is sufficient to meet the claimant’s section 15(1) case and move the analysis on to the government’s burden of justification under section 1. Moreover, the ease with which the Chief Justice upheld the challenged provisions in their entirety pursuant to section 1¹¹¹ raises concerns that the changes to the section 15(1) test put forward by Abella J. in *Quebec v. A.* may not have an impact on the results of Charter equality rights cases. Even if the section 15(1) majority led by Abella J. holds in future cases, it may simply shift an approach that has been highly deferential to government from section 15 to section 1.

IV. CONCLUSION

The ruling in *Quebec v. A.* is the third instalment in the Supreme Court of Canada’s ongoing efforts to revise its section 15 jurisprudence to reduce the burdens on equality rights claimants. The Court recognized, beginning in *Kapp*, that its section 15 jurisprudence had placed burdens on equality rights claimants that were inimical to the achievement of section 15’s purpose of promoting substantive equality. Interpreting section 15 in light of its substantive equality purpose, the Court has emphasized that section 15(1) should prevent the exacerbation of disadvantage experienced by members of historically disadvantaged groups, and that section 15(2) should permit governments to initiate

¹⁰⁸ *Id.*, at para. 416.

¹⁰⁹ *Id.*, at para. 423.

¹¹⁰ *Id.*, at paras. 423 and 428.

¹¹¹ *Id.*, at paras. 432-447, finding that the challenged provision of the *Civil Code* fell within a range of reasonable alternatives for maximizing choice and autonomy in family property and spousal support matters. Justice Bastarache’s opinion in *Walsh* followed similar reasoning. The difference is he concluded that a s. 15(1) violation was therefore not made out, whereas the Chief Justice in *Quebec v. A.* concluded that equality rights were infringed but justifiably so pursuant to s. 1.

programs aimed at improving their situation.¹¹² The purpose of section 15 is to identify and transform persistent patterns of social exclusion and subordination on the basis of grounds that are unreliable markers of a person's merits and capacities and generally irrelevant to legitimate government objectives.

If legislatures and governments act contrary to the purpose of section 15, as they have throughout Canadian history, the substantive equality purpose of section 15 requires that members of disadvantaged groups have meaningful access to meaningful remedies. The Constitution has placed the primary responsibility for delivering those remedies on the courts. However, access to the courts is hindered by the high costs of litigation, and those costs are exacerbated, and access to remedies hindered, by high procedural, evidentiary or legal burdens imposed on claimants. A paradox lies at the heart of section 15: its chief intended beneficiaries, the most disadvantaged members of our society, are also the least likely to be able to afford to pursue litigation seeking vindication of their equality rights. Equality rights jurisprudence needs to be responsive to this paradox, even if it is not capable of resolving it on its own.

The Court has acknowledged the need to reconsider its jurisprudence to ensure it is aligned with section 15's substantive equality purposes. The first step in this process came in *Kapp*, when the Court jettisoned the human dignity test articulated in *Law*. The second instalment involved the rejection, in *Withler*, of the mirror comparator group requirement put forward in *Auton* and *Hodge*. In *Quebec v. A.*, Justice Abella's majority opinion on section 15(1) rejected the requirement of proving the operation of prejudice or stereotype set out in *Kapp* and *Withler*, and refused to follow the Court's ruling in *Walsh*. These changes are all aimed at promoting section 15's substantive equality purpose. The focus of section 15(1) analysis, Abella J. affirmed, should be on the effects of a challenged law and on transforming laws or government practices that have adverse differential impact on the members of historically disadvantaged groups.

These important adjustments to the section 15(1) jurisprudence ought to relieve the burdens on section 15(1) claimants and allow the analysis to move more quickly to section 1, where government should have to show why it cannot achieve its objectives without imposing adverse differential impact on historically disadvantaged groups on the basis of

¹¹² *Kapp*, *supra*, note 25, at paras. 14-16; *Withler*, *supra*, note 26, at paras. 29-40; *Cunningham*, *supra*, note 28, at paras. 38-40; *Quebec v. A.*, *supra*, note 34, at paras. 319-347.

prohibited grounds. The substantive equality purpose of section 15 requires that the Court be willing to hold the government to a meaningful burden of justification under section 1 when infringements of section 15 are found.

While we ought to applaud the Court's willingness to undertake these important reconsiderations of section 15(1) doctrine, we should also retain a healthy dose of skepticism about whether they will actually produce different results. The best constitutional equality rights jurisprudence in the world is not going to help those who cannot afford the resources necessary to put the Court's fine words to work. Section 15's high aspirations are a cruel hoax if we cannot find effective ways to enable the most disadvantaged Canadians to put them into practice.

The McLachlin Court's record on Charter equality rights is distinguished by two features: one is its doctrinal plasticity, the remarkable series of about-turns and *mea culpas* one finds in the Court's section 15 rulings during the last decade. The recent adjustments to the jurisprudence are promising, but it is too early to say whether the Court will stay on the path it has charted. The dissenting opinion of LeBel J. in *Quebec v. A.*, on behalf of four members of the Court, is a reminder that future section 15 rulings could continue to require disadvantaged Canadians to navigate complicated hurdles before the government is required to justify the imposition of further disadvantage on the members of groups that have endured persistent patterns of social subordination on the basis of irrelevant personal characteristics. The Chief Justice's decisive opinion maintains some troubling elements of section 15(1)'s past, and takes a highly deferential approach to the government's burden of justification pursuant to section 1.

The other distinguishing feature of the McLachlin Court's section 15 jurisprudence is its consistent record of dismissing Charter equality rights claims, or denying leave to appeal to promising Charter equality rights claims, regardless of the operative test for discrimination at the time. In this sense, there is nothing new about *Quebec v. A.*; it is just another example of the Court dismissing a Charter equality rights claim in a lengthy and complicated set of opinions.

In light of the inaccessibility of Charter litigation, and the uncertainties produced by the instability and divisions in judicial approaches to section 15, statutory equality rights administered by human rights commissions and tribunals will continue to play a dominant role in promoting substantive equality. As we have seen, in recent years the contributions of human rights tribunals to the development of anti-

discrimination law, and to the delivery of remedies to equality rights claimants, far outstrip the contributions courts have made in section 15 rulings. The Court has wisely resisted calls made primarily by government lawyers to place new burdens on equality rights claimants in the statutory realm. In other words, the Court has not made the same mistakes in the context of statutory equality rights that have hindered the pursuit of substantive equality in the constitutional equality rights context. In cases like *Meiorin* and *Moore*, the Court has issued clear, confident and succinct rulings that have been successful in aligning the interpretation of statutory equality rights with the promotion of substantive equality. The *Moore* ruling, by affirming the simplicity of the *O'Malley* test for determining *prima facie* discrimination, should help forestall any further attempts to rely on Charter jurisprudence to elevate the burdens on equality rights claimants in the statutory context. The complete absence of the words prejudice or stereotype in Abella J.'s opinion in *Moore*, coupled with her removal of the need to prove the operation of prejudice or stereotyping from the section 15 test in her opinion in *Quebec v. A.*, should help focus the statutory and constitutional tests alike on the goal of promoting substantive equality for members of disadvantaged groups.

The division of labour between the claimant's affirmative case of *prima facie* discrimination, and the defences and justificatory arguments available to respondents set out in leading cases such as *O'Malley* and *Meiorin* has proven to be flexible and effective in the adjudication of statutory equality rights. A similar approach can work just as well when adjudicating constitutional equality rights in the context of section 15 and section 1 of the Charter. There is no need to impose additional burdens on equality rights claimants in either the statutory or constitutional realms. In both contexts, members of historically disadvantaged groups should have to establish adverse differential treatment on the basis of prohibited grounds. The burden of establishing a defence or justification should then shift to respondents. The Court's unanimous opinion in *Moore*, and the opinions for the section 15(1) majority in *Quebec v. A.*, bring us two large steps closer to just such a harmonized approach, one that would spell the end of the strange double life of Canadian equality rights.